NO. 01-1862EMSL

Criminal

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

DR. CHARLES THOMAS SELL, D.D.S.

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OF APPELLEE

RAYMOND W. GRUENDER
United States Attorney

HOWARD J. MARCUS
Assistant United States Attorney

DOROTHY L. MCMURTRY
Assistant United States Attorney
111 South 10th Street, Room 20.333
St. Louis, Missouri 63102
Attorneys for Appellee

STATEMENT AS TO ORAL ARGUMENT

This case raises complex issues that may be best addressed in oral argument. The Government requests an amount of time equal to that granted to appellant.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT PROPERLY ORDERED THE INVOLUNTARY ADMINISTRATION OF ANTI-PSYCHOTIC MEDICATION BASED UPON THE NEED TO RESTORE APPELLANT TO COMPETENCY, BUT ERRED IN OVERTURNING THE MAGISTRATE COURT'S FINDING OF DANGEROUSNESS?

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STATEMENT OF THE CASE

In 1997 Dr. Charles Thomas Sell was charged with health care fraud and released on bond. While on bond , Dr. Sell threatened a witness and his bond was revoked in 1998. Shortly thereafter Dr. Sell was indicted and charged with conspiracy, attempted murder and solicitation to commit violence.

Both cases were joined for trial. Prior to trial, on February 10, 1999, Dr. Sell filed a request for a competency hearing and provided the Magistrate Court with a report from his psychiatrist contending he suffered from a delusional disorder and was no longer competent.

Dr. Sell was sent to the Medical Center for Federal Prisoners in Springfield, Missouri (Springfield) for further evaluation. Springfield also concluded that Dr. Sell was incompetent and diagnosed him with a delusional disorder. Based upon Dr. Sell's own motion, the Magistrate Court found him incompetent to proceed to trial. As a result, he was returned to Springfield for competency restoration.

Springfield determined that the only way to restore the appellant to competency was through anti-psychotic medication, which Dr. Sell refused.

An administrative hearing was conducted at Springfield and the involuntary administration of anti-psychotic medication was ordered. Dr. Sell sought review in

the courts and was granted a full judicial hearing. The Magistrate Court found that the Government had shown in as strong a manner as possible, that anti-psychotic medication was the only way to render Dr. Sell not dangerous and competent to stand trial on the very serious and violent charges for which he now stands indicted.

The District Court affirmed the involuntary medication order based on the need to restore Dr. Sell to competency, but held that the Magistrate Court had clearly erred in finding that Dr. Sell was dangerous. This appeal followed.

STATEMENT OF THE FACTS

On May 16, 1997, Dr. Charles Thomas Sell, appellant, was charged in a federal criminal complaint with making false representations in connection with payments for health care services. Because of Dr. Sell's history of mental illness and angry and violent outbursts, the Government filed a motion for a competency examination on May 20, 1997. As a result, Dr. Sell was sent to the United States Medical Center for Federal Prisoners in Springfield, Missouri (hereafter "Springfield") for a competency examination. There he was examined by Dr. Robert Denney, Psy.D, a neuropsychologist.

First Competency Hearing July 15, 1997

Dr. Denney filed his forensic report on June 20,1997 (hereafter referred to as Denney Forensic Report). On July 15, 1997, a joint preliminary examination and hearing on competency and detention was held and Dr. Denney's report was received by the Court without objection. (Competency Hearing, July 15, 1997 at 36). Dr. Denney reported that Dr. Sell was guarded and uncooperative during the evaluation, refused to take tests, and provided only minimal information regarding his history and current mental state. (Denney Forensic Report at 8). Dr. Denney diagnosed Dr. Sell as having an "Axis II Paranoid personality disorder, provisional" and showing no "obvious signs of psychosis." Id. at 7. Dr. Denney concluded that Dr. Sell was

competent but noted there was a possibility that he could develop a psychotic episode depending on the nature of any past mental illnesses. Id. at 8.

Dr. Denney's report also described Dr. Sell's past police contacts[1] and his prior arrests for assault, resisting arrest and false imprisonment.[2]

Federal agents also testified at the competency hearing about instances when Dr. Sell had made threatening statements or acted aggressively toward others. One such incident occurred during a dispute between Delta Dental and Dr. Sell over the payment of a claim. Dr. Sell threatened to appear at the offices of Delta Dental and "shoot up the building." On another occasion, Dr. Sell unexpectedly appeared at a board meeting of Delta Dental, insisted that he was going to run for the board,

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[1]The Des Peres Police Department reported to Dr. Denney that Dr. Sell had numerous contacts with the department and filed many harassment complaints against officers in the department. Dr. Sell also complained that the Governor of Missouri was trying to kill him and alleged that the Des Peres Chief of Police was trying to kill him and run him off the road. Denney Forensic Report at 8-9.

On one occasion on June 15, 1984, police responded to a 911 call from Dr. Sell's office that there was a leopard outside his office. Upon arriving at the office, Dr. Sell stated in a loud excited voice: "Go ahead and shoot me, the leopard is getting on the bus! Shoot me! Shoot me!" He was restrained by the officers and taken to Lutheran Hospital where he was admitted. Denney Forensic Report at 8-9.

[2]Police records indicate that Dr. Sell received a two-year suspended sentence for false imprisonment in 1992 for holding an individual in his office against her will. Denney Forensic Report at 8.

disrupted the meeting, and refused to leave when requested to do so. (Competency Hearing, July 15, 1997 at 57)

Further, Dr. Sell also threatened and attempted to intimidate the Missouri Dental Board , which was investigating allegations against him. Dr. Sell went to the home of the investigator for the Missouri Dental Board and threatened him. He also called the wife of the investigator and harassed her on the telephone. Id. at 62-4.

There was also testimony that Dr. Sell carried a gun in case the police "try to get him." Id. at 64. On one occasion, he displayed a gun and gave an employee a knife to put in her pants in case the police stopped the car. Id. at 64. Dr. Sell also kept guns at his office and told an employee that he would shoot any insurance examiners who came to his office and tried to take his records. Id. at 64, 66.

The Magistrate Court also heard evidence concerning Dr. Sell's actions after the search of his office and home on April 17, 1997. Subsequent to the search, Dr. Sell telephoned one of the federal agents who had participated in the search. The agent recorded a portion of this conversation. Dr. Sell told an employee that he did so to scare the agent and to let the agent know that he, Dr. Sell, knew where the agent lived. After speaking to the agent on the telephone, Dr. Sell locked his office door, took a scalpel from his pocket, and made a gesture of cutting an agent's throat. Dr. Sell then asked the employee if she was willing to die for him. Id. at 67-68. Dr. Sell also

told this employee that he wanted to "kill the bastards", referring to the FBI. Id. at 67.

Afraid and concerned, the employee contacted the FBI and agreed to wear a transmitter when she returned to Dr. Sell's office. Via this transmitter, FBI agents heard Dr. Sell state that "for every FBI person he killed, a soul would be saved." Dr. Sell also spoke about "putting a bomb in his house," referring to the home of a FBI supervisor. Id. at 68.

When arrested[3] on the following day, May 16, 1997, Dr. Sell threw a cup of liquid at an FBI agent. Later while giving a urine specimen at the hospital, Dr. Sell threatened to throw urine on the agent. Id. at 69.

The Magistrate Court found Dr. Sell competent to proceed to trial.

First Indictment

Dr. Sell was subsequently indicted and charged with fifty-six counts of health care fraud, six counts of Medicaid fraud, and one count of money laundering. Dr. Sell and his wife Mary Sell were alleged to have submitted false claims to Medicaid and to private insurance companies for dental services not provided and to have submitted false documentation and bogus x-rays in support of these claims.

Initial Appearance January 22, 1998

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[3]Agents seized numerous weapons from the car of Mary Sell, Dr. Sell's wife, on the day he was first arrested. Detention Hearing, April 28, 1998 at 5.

Dr. Sell was released on bond in August 1997, but was again taken into custody in January 1998 after he attempted to intimidate a Government witness. Following his arrest, Dr. Sell was brought before United States Magistrate Judge Mary Ann Medler for an initial appearance on a bond revocation petition. At that hearing, Dr. Sell directed racial epithets toward the Assistant United States Attorney and others and screamed personal insults at Judge Medler. Dr. Sell's outburst culminated in his spitting directly in the face of Judge Medler. Judge Medler later characterized Dr. Sell's conduct as "out of control," making the following finding:

> I was still in chambers I could hear the defendant screaming, shouting, frequently using the (N) word, and I will note for the record that the Assistant United States Attorney, Ms. Dorothy McMurtry who is prosecuting this case was present in court at the time and is an African-American woman. At least one of the Marshals is also an African-American. It was most offensive, even to me in the other room. The Marshals, because of his out-of-control behavior, were concerned for safety. . .
> Before I could even begin the initial appearance Dr. Sell began screaming, shouting, raging, directing personal insults at me, and shouting for his lawyer. He appeared totally out of control. . .
> Again, directing personal insults to me, shouting and ranting. I tried to proceed with the initial appearance proceedings and advise him of his rights. He leaned forward and spat directly into my face. It was a direct hit.

(Bond Revocation Hearing at 5-6)

Bond Revocation Hearing January 26, 1998

At the bond revocation hearing, the Magistrate Court received evidence concerning Dr. Sell's attempt to intimidate a government witness. An FBI agent

testified that the witness reported that Dr. Sell pointed his hand like a gun at her, moved his hand as if he had fired the gun, and smiled at her. (Bond Revocation Hearing January 26, 1998 at 15). This witness, a former employee of Dr. Sell, had worn the transmitter to Dr. Sell's office in May 1997.

In addition to the above evidence, the pretrial services officer assigned to Dr. Sell testified concerning information provided by Dr. Jay Engelhardt, a psychiatrist. As a condition of his pretrial release, Dr. Sell had been seeing Dr. Engelhardt and had visited Dr. Engelhardt's office on January 21, 1998, the day of the above incident with the witness. (Dr. Engelhardt's office is in the same building where the witness worked.) Almost immediately after Dr. Sell left his office, Dr. Engelhardt contacted the pretrial services officer, to report that Dr. Sell was delusional and that he "was getting worse each day." Dr. Engelhardt reported that Dr. Sell was staying up at night guarding his door because he expected the FBI to "bust through it any day." Id. at 17-18. Dr. Engelhardt felt that Dr. Sell was not an immediate danger, but that "his status could change from day to day." Dr. Engelhardt had prescribed anti-psychotic medication, but Dr. Sell was not taking the medication. Id. at 18.

The pretrial services officer also testified that Dr. Sell had contacted him on January 22, 1998 about reporting for military duty. The pretrial services officer told Dr. Sell that he would not be able to go because of the conditions of his pretrial release.

Dr. Sell responded: "if [you don't] have the balls to tell the Judge that he was going, that he was gonna march down here, drag me up to the Judge and that he was gonna have her arrested if she did not allow him to go to this military leave." Id. at 19-20.

Based on the above evidence, the Magistrate Court revoked Dr. Sell's bond and the District Court affirmed the ruling. Dr. Sell then filed an interlocutory appeal in the Eighth Circuit, which affirmed the lower court in a per curiam opinion. United States v. Sell, No. 98-1887, (8th Cir. 1998).

Second Indictment/Detention Hearing April 28, 1998

After the bond revocation hearing, the FBI continued its investigation into allegations that Dr. Sell and his wife were attempting to arrange the contract murder of FBI agents and a federal witness. On April 23, 1998, Dr. Sell and his wife were charged in a second indictment with conspiracy, two counts of attempted murder of a federal witness, one count of attempted murder of a federal officer, and two counts of soliciting violence.

Following the second indictment, the Government moved to have Dr. Sell detained and a detention hearing was held on April 28, 1998. An FBI agent testified that Dr. Sell and his wife asked a government informant to arrange the murder of a former employee to prevent her from testifying against the Sells in the pending health

care fraud case. This employee had worn a transmitter to Dr. Sell's office on May 16, 1997 and had reported that Dr. Sell had attempted to intimidate her in January 1998. The other intended victims of the murder plot were three FBI agents, who had participated in the search and arrest in May 1997. (Detention Hearing, April 28, 1998 at 26-29).

A FBI agent testified that prior to his arrest in January 1998, Dr. Sell had given a government informant $500 to purchase a gun. Id. at 14. Later while in custody, Dr. Sell directed that Special Agent Anthony Box , the African-American FBI agent who had arrested him in January 1998, be killed. Mary Sell gave money to the informant for a hit man. Id. at 26-27.

At this hearing, evidence was also presented that Dr. Sell went target shooting while on bond on the health care fraud charges. The informant brought the gun, purchased with Dr. Sell's money, to Dr. Sell's home to show to him. The informant and Dr. Sell, who had a second gun, went to a firing range. There Dr. Sell purchased ammunition for the two guns and silhouette targets. He wrote "FBI" on the head portion of a silhouette and told the informant that the target represented Special Agent Anthony Box. Dr. Sell then fired shots into the head of the target. Id. 18-19.

There was also testimony that earlier Dr. Sell had told employees he would slit the jugular vein of any FBI agent who returned to his office. Id. at 7.

The Magistrate Court ordered Dr. Sell detained and the District Court affirmed the decision of the Magistrate Court .

Second Competency Hearing, April 14, 1999

As trial[4] neared in this matter, Dr. Sell filed a motion requesting a hearing to determine if he was competent to proceed to trial and able to assist in his defense. In support of his motion, Dr. Sell submitted the affidavit of Dr. Robert Cloninger, a psychiatrist. Dr. Cloninger stated that Dr. Sell suffered from a delusional disorder preventing him from assisting in his defense. The Government then filed, and the Court granted, a motion to have Dr. Sell examined for competency by a Government expert at Springfield.

On April 8, 1999, Springfield filed a competency report, submitted by Paul G. Zohn, M.A., psychology intern and Richart L. DeMier, PH.d., criminal psychologist. They concluded that Dr. Sell suffered from a delusional disorder, persecutory type, a severe mental illness and that he exhibited features associated with a paranoid personality disorder and that he was unable to assist in his defense. (DeMier Forensic Report at 10).

On April 14, 1999, the Magistrate Court held a competency hearing and Dr.

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[4]The two separate indictments were joined for trial and assigned to United States District Court Judge Donald J. Stohr.

DeMier's report was received by the Court without objection by Dr. Sell's attorneys. Dr. Sell nonetheless insisted on a hearing although his psychiatrist and the government's experts agreed that he was incompetent. (Competency Hearing, April 14, 1999 at 5). He stated that he wanted to prove that "the exact number of the corpses unidentified was six hundred and sixty six" and that a FBI agent was promoted to Assistant Director of Investigations because of his case. Id. at 8-9. The Magistrate Court denied Dr. Sell's request. The Magistrate Court found that Dr. Sell was incompetent and ordered that he be hospitalized in Springfield for treatment and for a determination whether competency could be restored.

Springfield Medication Hearing June 9, 1999

Upon Dr. Sell's return to Springfield, Dr. DeMier, the clinical psychologist assigned to Dr. Sell, and Dr. Wolfson, the consulting psychiatrist, determined that Dr. Sell was in need of anti-psychotic medication. On June 9, 1999, an administrative hearing was conducted at Springfield before Dr. Charles Glazzard, M.D., who served as the medical hearing officer. Both Dr. DeMier and Dr. Wolfson testified and advocated the use of anti-psychotic medication in the treatment of Dr. Sell. They further testified that the only way Dr. Sell could be restored to competency was through treatment with anti-psychotic medications.

Dr. Sell proffered an affidavit from Dr. Cloniger, M.D. who stated that he did

not believe that Dr. Sell would respond to the medication. Dr. Sell called a number of witnesses and concluded his evidence by testifying that he did not wish to receive anti-psychotic medication.

After the hearing was concluded, Dr. Glazzard issued a written report in which he approved the administration of medication. Dr. Glazzard found that

> anti-psychotic medication was indicated as the treatment of choice at this time. Because Dr. Sell's delusional thinking also has made him . . . dangerous, anti-psychotic medication if effective should help relieve him of this problem. Other forms of medication would not treat the primary symptom but could be helpful for other symptoms if the need arose. (For example, antidepressant medications or anti-anxiety medications.) They do not specifically treat delusional symptoms. Other forms of treatment such as seclusion (locked away from others) or restraints (physically held down to prevent danger to others or himself) could be helpful if necessary, but do not specifically treat delusional symptoms. Again, anti-psychotic medication is indicated at this time.

Report of Dr. Glazzard.

Dr. Sell's subsequent administrative appeal of Dr. Glazzard's decision was denied. At the request of the U.S. Attorney's Office, Springfield delayed the administration of the medication to give Dr. Sell the opportunity to seek review by the District Court.

Medication Hearing September 29, 1999

At Dr. Sell's request, United States Magistrate Judge Terry I. Adelman

conducted a full judicial hearing on September 29, 1999. At that hearing the Government called two witnesses, Dr. DeMier and Dr. Wolfson. Dr. DeMier diagnosed Dr. Sell with delusional disorder, persecutory type, and found that he was currently psychotic. (Medication Hearing at 8). Dr. DeMier further testified that it was his expert opinion that if Dr. Sell is not treated with anti-psychotic medication, his condition will continue to deteriorate. (Medication Hearing, September 29, 1999 at 8-9).

Dr. Wolfson, the consulting psychiatrist on medication issues, opined that Dr. Sell was psychotic and was in need of anti-psychotic medication. Dr. Wolfson stated that there was a good chance that Dr. Dr. Sell would be restored to competency if administered anti-psychotic medication. Id. at 94.

Dr. Sell submitted an affidavit from Dr. Cloninger, who stated that anti-psychotic medication would not benefit Dr. Sell. Dr. Cloninger recommended basic support, voluntary symptomatic treatment, and access to reading material and exercise. Id. at 102.

On April 9, 2000, the Magistrate Court issued a Memorandum and Order directing that Dr. Sell be involuntarily administered anti-psychotic medication. The Magistrate court found that Dr. Sell was dangerous and that anti-psychotic medication was the least restrictive way to restore him to competency. (April 9, 2000

Memorandum and Order at 14).

Dr. Sell sought review by the District Court. In an order issued on April 4, 2001, the District Court affirmed the involuntary medication order based on the need to restore Dr. Sell to competency. The District Court held that the Magistrate Court had clearly erred in finding that Dr. Sell was dangerous. (District Court Order, April 4, 2001 at 9).

Dr. Sell timely filed this instant appeal and requested that the administration of anti-psychotic medication be stayed pending a ruling by this Court. The Government consented to the request for a stay.

SUMMARY OF THE ARGUMENTS

The Government contends that District Court properly ordered the involuntary administration of anti-psychotic medication to Dr. Sell based on the Government's significant interest in rendering him competent to stand trial. However the District Court erred in concluding that the Magistrate Court was clearly erroneous in finding that Dr. Sell was dangerous.

While the Eighth Circuit and the Supreme Court have not imposed a standard of proof, the Government has established by a preponderance of evidence and as well as by the clear and convincing evidence standard that this medication is necessary.

Given the facts of this case, the Government has established its overriding interest in restoring Dr. Sell to competency. This interest is based upon the community's right to have this matter brought to trial and adjudicated. This is a fact intensive inquiry that centers around the serious and violent nature of this case as well as the status of the victims in this matter. The alleged murder plot in this case concerned the intended murder of a witness to prevent her testimony as well as the intended murder of an FBI Agent, which was predicated upon Dr. Sell's racial hatred.

Both the Magistrate Judge and the District Court found that the administration of medication was medically necessary and that any attendant risks to the medication were outweighed by their benefits. They further concluded that the administration of

anti-psychotic medication was the least restrictive method as well as the most likely way to restore the appellant to competency. Without medication Dr. Sell cannot be restored to competency and will continue to deteriorate.

The District Court erred in concluding that Magistrate Court was clearly erroneous in finding Dr. Sell dangerous. Dr. Sell's judgment and mental processes are deteriorating to the point that he is now dangerous. This assessment is based upon Dr. Sell's psychiatric history, mental processes (including delusions) and conduct within the institution. This conduct included improper interactions with a female staff member at Springfield, and is reflective of Dr. Sell's expanding delusions and blurring of borders, leading to a increased risk of violence. The District Court erred in focusing upon specific acts of Dr. Sell as opposed to Dr. Sell's potential for violence, which is the appropriate concern in making a finding of dangerousness.

The District Court properly considered Dr. Sell's Sixth Amendment right to a fair trial in ordering the administration of anti-psychotic medication. The District Court's conclusion that Dr. Sell's current impaired state mandated the medication also took into consideration the post-medication issues. The appropriate time to consider the effects of the anti-psychotic medication upon trial rights is after the medication is administered and the Court is in a position to assess the effects upon Dr. Sell. Dr. Sell also contends that if the medication affects his demeanor during trial, his mental defect

or disease defense could be adversely impacted. Dr. Sell has other means to advocate this defense and is not entitled to reproduce his mental state at the time of the crime at trial.

ARGUMENT

V. THE DISTRICT COURT PROPERLY ORDERED THE INVOLUNTARY ADMINISTRATION OF ANTI-PSYCHOTIC MEDICATION BASED UPON THE NEED TO RESTORE DR. SELL TO COMPETENCY, BUT ERRED IN OVERTURNING THE MAGISTRATE JUDGE'S FINDING OF DANGEROUSNESS

The Government contends that the District Court properly ordered the involuntary administration of anti-psychotic medication to Dr. Sell. The Court, in so ordering, properly based its decision on the Government's significant interest in rendering Dr. Sell competent to stand trial. The District Court erred, however, in overturning as clearly erroneous the Magistrate Court's finding of dangerousness.

A. Government's Burden and Standard of Review

Dr. Sell has a significant liberty interest in avoiding unwanted anti-psychotic medication, which interest is protected by the Due Process Clause of the Fifth Amendment. United States v. Weston,[5] 134 F.Supp.2d 115, 120 (D.C. 2001); see Riggins v. Nevada, 504 U.S. 127, 134 (1992)(Fourteenth Amendment); Washington

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Other related cases are: United States v. Weston, 55 F.Supp.2d 23 (D.D.C. Jun 18, 1999)(NO. CRIM A 98-357 EGS); United States v. Weston, 69 F.Supp.2d 99 (D.D.C. Sep 09, 1999) (NO.CRIM. A. 98-357 EGS); United States v. Weston, 206 F.3d 9, 340 U.S.App.D.C. 366 (D.C.Cir. Mar 24, 2000)(NO. 99-3119); United States v. Weston, 134 F.Supp.2d 115 (D.D.C. Mar 06, 2001)(NO.CRIM. A. 98-357(EGS)).

v. Harper, 494 U.S. 210, 221 (1990)(Fourteenth Amendment). The first question presented in this appeal is what showing the Government must make to justify the administration of unwanted medication, an issue of substantive due process. The second question is what procedural protections must accompany any such administration.

1. **Substantive due process**. The substantive issue involves a "definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." Mills v. Rogers, 457 U.S. 291, 299 (1982). Incorporated within that issue is the test the court must apply - strict scrutiny or the rational basis test - in determining whether the Government has met its burden of showing that its interests outweigh Dr. Sell's liberty interest in avoiding unwanted medication. The case law does not supply a clear answer as to which of these standards applies. The Supreme Court in Harper, 494 U.S. at 224-225, adopted the rational basis test in considering the forcible medication of a dangerous convicted felon. In Riggins, 504 U.S. at 136, the Supreme Court declined to decide whether the strict scrutiny standard applied to forcible medication of a dangerous pretrial detainee. The Sixth Circuit, in United States v. Brandon, 158 F.3d at 957, and the Tenth Circuit , in Bee v. Greaves, 744 F.2d 1387, 1395 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985), adopted the strict scrutiny standard for forcible medication of a

non-dangerous pretrial detainee. However, the district court in United States v. Sanchez-Hurtado, 90 F.Supp.2d 1049, 1055 (S.D.Ca. 1999), declined to adopt the strict scrutiny standard in the same circumstances, concluding that to do so would be contrary to the Supreme Court's decision in Riggins.

The Government asserts that the court in United States v. Sanchez-Hurtado, 90 F.Supp.2d 1055, is correct: Riggins does not require application of the strict scrutiny standard here. At the same time, the Government asserts that it has met the strict scrutiny standard which the district court apparently applied when it held that Dr. Sell has a liberty interest so fundamental that it cannot constitutionally be impinged by Government action "unless the infringement is narrowly tailored to serve a compelling state interest." District Court Order of April 4, 2001, at 3, citing Reno v. Flores, 507 U.S. 292, 301-02 (1993).

As to the showing which must be made before a pre-trial detainee can be forcibly medicated, the Government asserts that the District Court was correct in holding that the Government is required to show at least an "overriding justification and a determination of medical appropriateness" for involuntary administration of anti-psychotic drugs. District Court Order of April 4, 2001, at 4, citing Riggins v. Nevada, 504 U.S. at 135; Washington v. Harper, 494 U.S. at 227. The ultimate issue, whether the Government has made the requisite showing, is a question of constitutional

law subject to de novo review. See, e.g., United States v. Allen, 247 F.3d 741, 757 (8th Cir. 2001); United States v. Oseby, 148 F.3d 1016, 1022 (8th Cir. 1998). The district court's findings of fact underlying that ultimate determination are subject to the clearly erroneous standard. United States v. Steil, 916 F.2d 485, 488 (8th Cir. 1990).

2. **Procedural due process.** The procedural question "concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." Mills v. Rogers, 457 U.S. at 299.[6] The issue presented here is the burden of proof the Government must meet in establishing an overriding justification and a determination of medical appropriateness. Dr. Sell argues that the District Court erred in not requiring the Government to prove by clear and convincing evidence each of the prerequisites for involuntary medication. He relies on United States v. Brandon, 158 F.3d at 961, and

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[6]Some courts have held, in the context of treating a prisoner for dangerousness, that the prisoner is not entitled to a judicial hearing prior to the administration of anti-psychotic drugs, so long as adequate procedures safeguarding the prisoner's rights govern the custodian's decision to administer the drugs. See, e.g., United States v. Morgan, 193 F.3d 252, 263 (4th Cir. 1999); see also Bell v. Wolfish, 441 U.S. 520, 548 (1979)("judicial deference is accorded ... because the operation of correctional facilities is peculiarly the province of the Legislative and Executive Branches."). The Government has taken that position in the pending appeal of United States v. Weston, 134 F.Supp. 2d 115 (D.D.C. 2001). Other courts have concluded that a judicial proceeding is required. See, e.g., United States v. Brandon, 158 F.3d 947, 953-955 (6th Cir. 1998). The Government did not take the position in this case that no judicial proceeding was required; therefore that issue is not before this Court.

United States v. Weston, 134 F.Supp. 2d at 121, which held that the Government must prove each prerequisite by clear and convincing evidence.

The issue of the Government's burden of proof when it seeks involuntary medication of a pre-trial detainee has not been decided by the Supreme Court or by the Eighth Circuit. In Riggins v. Nevada, 504 U.S. at 135, the Supreme Court declined to define the burden of proof the Government must meet in order to involuntarily medicate a non-dangerous pretrial detainee. The Court expressly left open for later adjudication the standard of proof required on these issues. The Government asserts that this Court need not determine the standard of proof to decide this case, because the Government's evidence satisfies both the preponderance standard and the more demanding clear and convincing standard.[7]

Dr. Sell also argues that the District Court erred in failing to apply the clear and convincing standard, because there is no express reference to the clear and

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[7]The clear and convincing standard is an intermediate standard of proof, not susceptible to precise definition. Cornell v. Nix, 119 F. 3rd 1329, 1335 (8th Cir. 1997), citing) Colorado v. New Mexico, 467 U.S. 310, 316 (1984). Clear and convincing evidence is defined as evidence that "place [s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable." Id.; see also Eldridge for Eldridge v. Sullivan, 980 F. 2d 499, 500 (8th Cir. 1992) (clear and convincing evidence is that evidence "which `instantly tilt[s] the scales in the affirmative when weighed against evidence in opposition, and clearly convinces the factfinder that the evidence is true.")(citations omitted); United States v. State of Michigan, 653 F.2d 277, 279 (6th Cir.), cert. denied, 454 U.S. 1124 (1981) (truth of the contention is highly probable).

convincing standard in the orders of the Magistrate Court and the District Court. While it is true that the Magistrate Court and the District Court in the present case did not make an explicit ruling on whether the evidence was clear and convincing, this does not end the inquiry. As this court stated in United States v. Evans, 697 F.2d 240, 248 (8th Cir.); cert. denied, 460 U.S. 1086 (1983), "[t]o require an explicit recitation of a 'clear and convincing' finding would be a historical step backward to a time when form ruled over substance . . . Although an explicit ruling would simplify [this Court's] review and is preferable, an implicit finding does not constitute reversible error."

The Government asserts that the Magistrate Court implicitly recognized that the Government had met the clear and convincing standard of proof when it stated in its August 9, 2000 Memorandum and Order that: "the Government has shown, in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial . . ." (August 9, 2000 Memorandum and Order at 14) (emphasis added). In a footnote, the Magistrate Court also stated that it believed that the Government had "met the standards required by Brandon ...," which required clear and convincing evidence and a strict scrutiny analysis. Id. at 14.

B. Restoring Dr. Sell to Competency to Stand Trial

The Government asserts that it has proved by clear and convincing evidence the requisite overriding justification and determination of medical appropriateness for the forcible administration of anti-psychotic drugs to restore Dr. Sell to competency.

1. **Overriding justification**. The District Court, after reviewing the entire record, concluded that, inter alia, the record supports the finding "that the administration of such drugs appears necessary to serve the Government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges." (District Court Order, April 4, 2001 at 17).

The Government asserts that the District Court correctly concluded that the Government established a compelling interest in bringing Dr. Sell to trial. The "constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." Illinois v. Allen, 397 U.S. 337, 347 (1970)(Justice Brennan concurring). The community's interest in fairly determining guilt or innocence is of great importance. Winston v. Lee, 470 U.S. 753, 762-63 (1985). In Khiem v. United States, 612 A.2d 160, 167 (D.C. 1992), cert. denied, Tran Van Khiem v. United States, 507 U.S. 924 (1993) the court recognized the Government's interest in administering anti-psychotic medication to restore a defendant charged with serious crimes to competence. It stated:

> Since it has been impossible for several years to bring [defendant] to trial to determine his guilt or innocence without first administering psychotropic medication, the Government's interest is a 'fundamental' one and of a very high order indeed.

The District Court in United States v. Weston, 134 F. Supp 2d at 132, applied these principles in determining the Government's interest in bringing the defendant to trial for the murder of two United States Capitol police officers. In ordering forced medication of the defendant, the Court reasoned that not every case provides the Government with a compelling interest. The factors giving rise to such an essential interest in Weston were: the serious and violent nature of the charges; the status of the victims as police officers; and the fact that the murders took place in the Capitol among a crowd of innocent bystanders. Id. at 132.

The Government asserts that similar factors in this case give rise to the Government's compelling interest in seeking forced medication. Dr. Sell is alleged to have solicited a hit man to kill a witness and an FBI agent - serious, violent crimes that strike at the heart of the criminal justice system. Both intended victims of Dr. Sell's plot hold a special status in the justice system. Dr. Sell wanted the witness murdered in retaliation for her cooperation with the Government and to prevent her from testifying in the underlying health care fraud case. An attempt to murder a federal witness to prevent her attendance at trial obviously obstructs and subverts the justice

system.

The same can be said concerning the plot to murder Special Agent Anthony Box. Special Agent Box's intended murder was predicated upon his official status as an FBI agent, as well as Dr. Sell's racial prejudices and hatred. The integrity of the system compels that this case be adjudicated.

Dr. Sell disputes the nature and seriousness of the pending charges and states that "the Government has manufactured a sinister murder plot." (Appellant's brief at 30). Further, Dr. Sell attempts to minimize his acts and to analogize his conduct to that of the defendant in United States v. Brandon, who had sent a threatening letter. The Government asserts to the contrary that this case involves a serious plot by Dr. Sell to murder an FBI agent and a government witness, which proceeded to the point of providing funds intended for a hit man. Further, this appeal is not the appropriate vehicle for arguing the sufficiency of the evidence supporting the murder plot. A trial is the proper forum for testing the Government's evidence.

Restoring Dr. Sell to competency serves his interests, as well as the Government's compelling interest. Dr. Sell has repeatedly and publicly demanded a trial, claiming that the Government is preventing him from having his day in Court. The Government shares Dr. Sell's desire to proceed to trial, but the trial may not proceed while Dr. Sell is incompetent. To do so would be legally and morally wrong.

Anti-psychotic medication is the only viable means to competency and the trial that both Dr. Sell and the Government want.

The District Court did not err in determining that the Government established an overriding justification for restoring Dr. Sell to competency. See Papantony v. Hedrick, 215 F.3d 863, 865 (8th Cir. 2000) (in a Bivens context, the Eighth Circuit stated that, given the Supreme Court's decision in Riggins, "a pretrial detainee, likely has no substantive due process right not to be forcibly administered anti-psychotic drugs to render him competent to stand trial.")

2. **Determination of medical appropriateness**. After reviewing the evidence, the Magistrate Court found that Dr. Sell can be restored to competency if treated with anti-psychotic medication. It made three additional determinations: that the serious side effects that may occur from such treatment could be mediated by the use of newer drugs or by changing medicines; that the possible risks attributed to taking the drugs are far outweighed by their benefits; and that anti-psychotic medication is necessary and the only way to render Dr. Sell competent and able to assist in his defense. (August 9, 2000 Memorandum and Order at 12-13).

The Magistrate Court also followed the procedures called for by the Sixth Circuit in United States v. Brandon., 158 F.3d at 960. Brandon allows medication for competency alone if the Court conducts an evidentiary hearing and finds by clear

and convincing evidence that the medication is "the least restrictive and least harmful means of satisfying the Government's goal. . .of finding [the individual] competent to stand trial." Id.

The Magistrate Judge noted, consistent with Brandon, that

> the Government has shown, in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial on the very serious and violent offense for which he now stands indicted. There are no less restrictive means by which this may be accomplished, including other medications, psycho-therapy without the use of anti-psychotic medications, and locking down the defendant, all of which have either been attempted or considered .

(August 9, 2000 Memorandum and Order at 14).

The District Court, after reviewing the entire record, concluded that

> the record supports three findings: (1) that anti-psychotic drugs are medically appropriate for defendant, (2) that they represent the only viable hope of rendering defendant competent to stand trial, and (3) that the administration of such drugs appears necessary to serve the Government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges. These findings yield the conclusion that defendant's substantive due process rights do not preclude the involuntary administration of anti-psychotic medication.

(District Court Order of April 4, 2001 at 17).

The Government submits that the District Court and the Magistrate Court were correct in their conclusions. As the following recitation of the evidence adduced at the hearing on September 29, 1999 in the Magistrate Court reflects, the Government

submitted clear and convincing evidence that administration of anti-psychotic medication is the only medically appropriate course of treatment for Dr. Sell.

The parties do not dispute that Dr. Sell suffers from a serious mental illness that has rendered him incompetent to stand trial and that treatment is necessary to ameliorate the symptoms of this illness. The disagreement centers on the appropriateness of anti-psychotic medication to treat the mental illness.

The Government's evidence consisted of the testimony of two Government experts and articles from the medical literature concerning the efficacy of anti-psychotic medication in the treatment of delusional disorders and other psychoses. The Government experts testified concerning the medical need and the appropriateness of anti-psychotic medication for Dr. Sell and testified that no less intrusive form of treatment was available. A brief review of the testimony of the Government experts follows.

Dr. Richard DeMier, Ph.D., a staff psychologist at Springfield, was primarily responsible for Dr. Sell's treatment. Dr. DeMier had at least weekly contact with Dr. Sell and also received frequent reports from the staff of the medical center who had daily contact with Dr. Sell. (Medication Hearing September 29, 1999 at 5-6). Based on this and other information, Dr. DeMier diagnosed Dr. Sell as suffering from a delusional disorder of the persecutory type, a psychotic condition. Id. at 7- 8. Dr.

DeMier stated that patients suffering from delusional disorder have fixed, deeply ingrained false beliefs that are firmly held even in the face of compelling contradictory evidence. Patients such as Dr. Sell, who have persecutory delusions, generally feel that they are being threatened or harassed and have a tendency to misinterpret neutral stimuli or benign events as something threatening or specifically directed at them. Such patients experience their environment consistent with the delusional beliefs and new material is often incorporated into the delusion as time goes on. Id. at 8, 22-23.

Relying on his training and experience, Dr. DeMier testified that anti-psychotic medication is the best and only effective treatment for psychosis, including delusional disorders. Id., at 22, 58. Without anti-psychotic medication, Dr. DeMier indicated that Dr. Sell's condition will continue to deteriorate. Id. at 8. Dr. DeMier concluded that anti-psychotic medication is the only way to improve Dr. Sell's mental state, render him non-dangerous, and restore him to competency. Id. at 30.

Dr. DeMier also testified that the medical literature reflects that anti-psychotic medication is the only treatment that has been consistently effective in treating delusional disorders. He referred specifically to the Comprehensive Review of Psychiatry by Kaplen and Sadock, an authoritative book in the area of psychology, which states that anti-psychotic medication is the treatment of choice for delusional disorders. Id. at 58-59.

Dr. James Wolfson, M.D., the consulting staff psychiatrist at Springfield, concurred with Dr. DeMier on the appropriateness of anti-psychotic medication for Dr. Sell and also agreed that Dr. Sell's condition will continue to deteriorate without medication. Id. at 76, 78. Based on his contacts with Dr. Sell and his review of Dr. Sell's records, Dr. Wolfson testified that Dr. Sell is psychotic and that the only way to treat him is with anti-psychotic medications. Id. at 75-76. Dr. Wolfson stated that anti-psychotic medication is the appropriate treatment for Dr. Sell, whether his diagnosis is schizophrenia or delusional disorder. Id. at 77.

Dr. Wolfson testified that his own experience, the medical literature, and the experts relied on by Dr. Sell demonstrate that anti-psychotic medications, combined with psychotherapy, are effective in the treatment of delusional disorders. Clearly this evidence established the need for anti-psychotic medication.

Dr. Sell next argues that the Government's evidence concerning medical appropriateness was insufficient because the Government experts failed to identify the specific medications that they intended to administer to Dr. Sell and kept the identity of the medications "secret." This argument is not supported by the record. The Government's medical experts identified several anti-psychotic medications by name that would be appropriate for Dr. Sell, notably several atypical anti-psychotic medications:(1) quetiapine, sold under the brand name seroquel;(2) olanzapine, sold

under the name zyprexa; (3) ziprazodone, which had not been finally approved at the time of the medication hearing, and (4) several typical anti-psychotic medications, such as pimozide and Haldol. Id. at 90.

Dr. Wolfson testified that he did not wish to limit himself to any one anti-psychotic medication, but would try out medications until he found one offering the greatest benefits to Dr. Sell, with the fewest negative side effects. Dr. Wolfson testified that he hoped he would be able to discuss the relative merits of the particular medications with Dr. Sell, so that Dr. Sell would have some input into the choice of medication. Id. at 89-90 .

Although Dr. Wolfson expressed a preference for atypical anti-psychotics, he acknowledged that Dr. Sell would have to cooperate in the use of the atypical anti-psychotic medication because the medication had to be taken orally. Id. at 89. He believed that the atypical drugs are best suited for Dr. Sell's condition and had a more benign side effect profile. Id. at 91. Because Dr. Sell is unlikely to cooperate, at least initially, with the proposed medication treatment, the Government also offered evidence concerning the effectiveness of typical anti-psychotics and their side effects (which will be discussed more fully below).

Dr. Wolfson considered Dr. Sell's prior treatment in the early 1980s with Haldol, an older injectable typical anti-psychotic medication. Following the

administration of Haldol, Dr. Sell was released from the hospital and returned to his dentistry practice. Id. at 91 – 92. Dr. Sell's medical records indicate that he suffered one side effect from Haldol, a dystonic reaction (a type of muscle spasm) that was controlled by a reduction in the medication. The records do not indicate that Dr. Sell had any other problems tolerating the medication. Id. at 92.

Dr. Sell disputed the conclusions of Drs. DeMier and Wolfson, and offered contrary evidence through the affidavit of Dr. Cloninger, a psychiatrist. Dr. Cloninger stated that he had reviewed the scientific literature and that there was no data indicating that anti-psychotic medication offers a benefit to patients with delusional disorders. He further stated that he "did not see any justification for involuntary treatments that carry any risk at all in the absence of documented evidence of benefit to the person." Finally, he stated that "the treatment of Dr. Sell should be limited to basic supportive and voluntary symptomatic treatment... [that] would include a safe and supportive milieu with access to exercise and reading material... [and] voluntary symptomatic treatment... with antidepressants, which he has found helpful to his mood and energy levels in the past." (Affidavit of Dr. Cloninger).

Dr. Wolfson strongly disagreed with Dr. Cloninger's conclusions. (Medication Hearing at 97). Dr. Wolfson noted that the Opjordsmoen and Retterstol studies, relied on by Dr. Cloninger, did not demonstrate that delusional disorder patients did not

benefit from anti-psychotics. He stated that the conclusions to be drawn from these studies were limited because the studies were not large scale, double blind, placebo control studies. Significantly, patients in the studies were not treated uniformly. Further, as noted by the authors of the studies, "there are more problems with non-compliance in delusional disorder, than in schizophrenia" and thus noncompliance by delusional disorder patients may account for the lack of benefit to these patients. Id. at 99-100. Dr. Wolfson agreed, paraphrasing this concern by stating that it's "hard to assess the benefit of medication if it's still in the bottle and not in the person." Id. at 100-101.

Dr. Wolfson also quoted the Opjordsmoen and Retterstol studies that indicate that "at least Pimozide [an anti-psychotic medication] may be effective in delusional disorder." Id. at 134. Dr. Wolfson continued by stating that "there is much more evidence" than Dr. Cloninger cited which demonstrates the effectiveness of anti-psychotic medication in treating delusional disorders. Id. at 135.

As to the course of treatment proposed by Dr. Cloninger, essentially limited to psychotherapy and antidepressants, Dr. Wolfson characterized it as "insufficient" and inadequate to treat Dr. Sell's delusional disorder, stating that if "we were having this conversation in 1935, that would be the best that I would be able to offer him."Id. at 102. Dr. Wolfson testified that it would be irresponsible and wrong not to use anti-

psychotic medications for Dr. Sell. He further testified that psychotherapy is not effective with delusional disorder patients who have not received anti-psychotic medication. After medication is employed, psychotherapy is of value in treating such patients. Id. at 119. Dr. DeMier also stated that psychotherapy is not recommended for delusional disorders because therapy will not cause a patient to give up firmly held delusions. Id. at 66-7.

In addition to considering the efficacy of anti-psychotics, the Magistrate and District Courts weighed the anticipated benefits against possible risks as identified by the parties' experts. Dr. DeMier and Dr. Wolfson both acknowledged that there were risks involved with the use of anti-psychotic medication. The likelihood and severity of possible side effects depend on the type of anti-psychotic medication administered. The newer, atypical anti-psychotics have lower side-effect profiles, but they are not available in injection form. Dr. Wolfson testified that the side effects of the typical anti-psychotics could generally be managed through close monitoring and the choice of medication and dosage. Id. at 85.

According to Dr. Wolfson, there are three main side effects involved in using anti-psychotic drugs. The first is tardive dyskinesia and/or dystonic reaction, which causes a person to have involuntary body movements of various parts of the body. The effect may be temporary or permanent and can be reduced by the use of other

medications along with the anti-psychotic medication, or by switching from one anti-psychotic medication to another anti-psychotic medication. Id. at 84-5.

The second common side effect is sedation in varying degrees in some patients. With newer drugs, this occurs less frequently and can be alleviated by changing the dosage of the medication. Dr. Wolfson testified that he would choose a medication or alter the dosage of the medication to minimize sedation in order not to impair Dr. Sell's ability to assist in his own defense. Id. at 85.

According to Dr. Wolfson, the third major side effect from anti-psychotic medication is neuroleptic malignant carcinoma, which can be fatal. Of the 1000 to 2000 patients that Dr. Wolfson has medicated with anti-psychotic drugs, none have developed this syndrome. Dr. Wolfson had heard of this complication only twice during his career. Id. at 86-7.

Dr. Sell argues that the Magistrate Court was mistaken in its findings concerning the frequency and permanency of the serious side effects, referred to above. The District Court took note of Dr. Sell's argument and recognized that the Magistrate Court in its reconsideration ruling of August 18, 2000 concluded that "the potential benefit of treatment far outweighs any risks," even if the side effects were permanent and as frequent as Dr. Sell alleged. (District Court Order, April 4, 2001 at 6).

The Government submits that having reviewed the full record before the

Magistrate Court, the District Court did not err in finding that the "medical benefits outweigh the medical risks, giving due weight to the range of seriousness of the various risks, to the prospects for alleviating certain side effects with supplemental medication, and to the fact that a particular side effect may or may not occur in [Dr. Sell]." Id. at 6-7.

Dr. Sell next argues that the Government did not establish that there was a reasonable probability that Dr. Sell would be restored to competency. He asserts that the Magistrate Court and the District Court found that Dr. Sell could be restored to competency only by the use of anti-psychotics, but did not analyze whether Dr. Sell would in fact be restored to competency. Contrary to Dr. Sell's assertions, the Government presented evidence and both courts found that there was a reasonable probability that Dr. Sell would be restored to competency. The Government is not required to guarantee that "medication will restore the defendant to competency, but there must be at least a showing that such a course of action can reasonably be expected to in fact render the defendant competent." Woodland v. Angus , 820 F.Supp. 1497, 1512 (D.Utah 1993).

The Magistrate Court and the District Court received evidence that delusional disorder patients had been restored to competency through the use of anti-psychotic medication. Dr. DeMier testified that he had been involved in treating two patients

diagnosed with delusional disorders with anti-psychotic medications, and the treatments were successful. (Medication Hearing September 29, 1999 at 20-21). One patient in his late fifties was administered Haldol and was restored to competency. The second patient, receiving olanzapine, showed significant improvement , but was not restored to competency. Id. at 19, 30, 63, 65-6.

Dr. Wolfson testified that he had also used anti-psychotic medications on seven patients diagnosed with delusional disorders and all benefitted clinically. Id. at 93-4, 117. Three of the seven patients were treated outside a legal setting. Id. at 117. The other four patients were treated as part of a competency restoration program. Three of the four patients treated with anti-psychotic medications were restored to competency; one was restored twice. Id. at 92-3.

Dr. Wolfson further testified that he had treated 1000 to 2000 patients with anti-psychotic medications and had achieved good results in a great majority of the cases. Id. at 83-4. Dr. Wolfson believed that there was a good chance that anti-psychotic medications would restore Dr. Sell to competency and render him less dangerous, regardless of Dr. Sell's diagnosis or the specific anti-psychotic medication used. Id. at 160.

The Magistrate Court stated in its Memorandum and Order of August 9, 2000 that there was "a substantial probability that [Dr. Sell] will be restored to

competency"and there was "a substantial probability that within [120 days Dr. Sell] will attain the capacity to permit the trial to proceed if medicated." Id at 13, 14.

Contrary to Dr. Sell's arguments, the District Court did not shift the burden to Dr. Sell to establish the inefficacy of the anti-psychotic medication. Dr. Sell provides no citation to the record to support this argument. At no point in the hearing or in the District Court's order does the District Court require Dr. Sell to produce evidence or to rebut evidence offered by the Government. In its order, the District Court properly referred to and considered Dr. Sell's "generalized arguments concerning the efficacy of anti-psychotic drugs," but did not require Dr. Sell to prove the drugs were ineffective. (District Court Order, April 4, 2001 at 7).

Thus the Government has shown that the administration of anti-psychotic medication is necessary to accomplish a compelling interest, administration of the medication is medically appropriate, and there are no less restrictive means by which to restore Dr. Sell to competency.

C. Dangerousness

The Supreme Court in Riggins, 504 U.S. at 135, has clearly approved the involuntary medication of dangerous pretrial detainees. Forcible medication of a dangerous pretrial detainee has also been the subject of several decisions in the lower courts. See e.g., United States v. Morgan, 193 F.3d 252, 263 (4th Cir. 1999); United

States v. Weston, 134 F. Supp. 2d 115 (D.D.C. 2001); United States v. Keeven, 115 F.Supp. 2d 1132 (E.D.Mo. 2000). Medication of a dangerous inmate clearly involves an overriding government interest: the control and protection of a dangerous inmate, as well as protection of the correctional and medical staff.

The Magistrate Court found the Government had made a substantial and very strong showing that Dr. Sell was a danger to himself and others and that the only way to render him less dangerous was by administering anti-psychotic medication. (August 9, 2000 Memorandum & Order at 12). The District Court concluded that the Magistrate Court's finding that Dr. Sell is a danger was clearly erroneous. District Court Order, April 4, 2001 at 11. The Government respectfully asserts that the District Court's conclusion is erroneous, and that Dr. Sell's dangerousness warrants the involuntary administration of anti-psychotic medication.[8] United States v. S.A., 129 F.3d 995, 1000 (8th Cir. 1997), cert. denied, 523 U.S. 1011 (1998)(clearly erroneous standard of review for a finding of dangerousness); United States v. Ecker, 30 F.3d 966 (8th Cir. 1994), cert. denied, 513 U.S. 1064 (1994).

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[8]An appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although the argument may involve an attack upon the reasoning of the lower court. United States v. American Railway Express Co., 265 U.S. 425, 435 (1924). Thus, the appellate court may affirm on any basis supported by the record. United States v. Manzer, 69 F.3d 222, 228 (8th Cir. 1995); United States v. Abadia 949 F.2d 956, 958 n.12 (8th Cir. 1991).

"Dangerousness is certainly not an alien term to trial judges." United States v. Cox, 719 F.2d 285, 287 (8th Cir. 1983), cert. denied ,466 U.S. 929 (1984). "In bail and sentencing proceedings, trial judges routinely consider the potential danger a defendant poses to society." Id.; United States v. Steil, 916 at 488.

In determining whether a person is dangerous, the inquiry must focus on the potential for dangerousness, not just past overt acts of violence. United States v. Ecker, 30 F.2d 966, 970 (8th Cir. 1994), cert. denied, 513 U.S 1064 (1994). A finding that an inmate is dangerous does not require that the inmate strike or physically injure staff within a federal correctional institution. United States v. Weston, 134 F.Supp. 2d at 129. Courts have considered the following factors in concluding that a defendant is dangerous: history of violent and aggressive behavior, mental instability, hallucinations, United States v. S.A., 129 F.3d at 1000, delusions, hostility and perceptions of threats. United States v. Weston, 134 F.Supp.2d at 127.

The District Court clearly erred in concluding that Dr. Sell was not dangerous. The District Court focused upon a few isolated acts of Dr. Sell, without giving adequate consideration to Dr. Sell's history, conduct and, most importantly, his potential for violence. Further, the District Court apparently rejected the expert medical opinions of Dr. DeMier and Dr. Wolfson, who testified that Dr. Sell was dangerous. Dr. Sell did not offer medical evidence that he was not dangerous. Thus, there was no

contrary medical opinion for the District Court to consider and on which it could base its decision concerning dangerousness.

The Magistrate Court's conclusion, on the other hand, was amply supported by the following evidence presented at the hearing and evidence and findings from past competency, detention and preliminary hearings. Of particular significance are the forensic report prepared by Dr. DeMier and the earlier forensic report prepared by Dr. Denney (discussed at pages 3-4 of this brief).

The forensic report of Dr. DeMier portrayed Dr. Sell as a seriously mentally ill person, who had suffered from mental illness since the early 1980's. Dr. Sell was admitted to Barnes Hospital in September 1982, because he believed that communists had contaminated the gold that he was using for dental fillings. He was hospitalized for nine days, treated with Haldol, and released in improved condition. (DeMier Forensic Report at 3). In 1984 Dr. Sell was admitted to Lutheran Hospital after he reported a leopard in his office. Police searched his office and found a sword, a long-handled axe, and a knife with a six inch blade. Following the incident, Dr. Sell's ex-wife was interviewed; she stated that he had threatened her life and she was afraid of him. In 1983 and 1987, Dr. Sell also received psychiatric treatment. Id. at 3.

Dr. DeMier reported that Dr. Sell held several delusions regarding the FBI and was obsessed with the Branch Davidians and Waco. Dr. Sell stated that he had been

flown to Texas prior to the raid on the Branch Davidian compound so that he would be available to identify the remains of government sharpshooters killed during the raid. He further claimed to have seen a "tank shoot fire into that place." According to Dr. Sell, the government wants him declared incompetent to discredit him and to prevent him from disclosing what happened at Waco. (DeMier Forensic Report at 6). Moreover, Dr. Sell believed that the FBI supervisor in St. Louis had received a promotion as a reward for his work on Dr. Sell's case. Id. at 6.

Dr. Sell told Dr. DeMier that Dr. DeMier would have to testify before Congress because Dr. DeMier' s actions and handling of his case had prevented the truth from coming out about the FBI involvement at the Branch Davidian complex in Waco. (Medication Hearing at 10-11). Dr. Sell also confronted Dr. DeMier about his rights under the Geneva Convention, asserting that he should be allowed to practice dentistry at Springfield. Id. at 11; (DeMier Forensic Report at 6). Finally, Dr. Sell expressed the belief that the federal government is the Anti-Christ and if he were transferred to a county jail, the FBI would have him murdered. Id. at 11-12.

Dr. Sell also believed that FBI Director Freeh prevented him from being released to join his military unit in Kosovo. Dr. Sell identified himself as one of the military's top experts in biological, chemical, and nuclear warfare and wanted to contact his commander to secure his release. Dr. Sell expected the U.S. military to come to

Springfield to release him because his presence was essential to the safety of the troops. Id. at 11.(DeMier Forensic Report at 6). Finally realizing that he would not be sent to Kosovo, Dr. Sell stated: "I think someone deliberately wants to see a lot of American boys dead." Id. at 11.

Dr. Sell further believed that there was a "devil worship cult that wanted to take over the U.S. Government." Dr. Sell also reported that he could hear things that others could not and that he had the ability to invoke spirits and communicate with the dead. (DeMier Forensic Report at 4-7). The report also noted that Dr. Sell misinterprets benign comments or events as having hidden meaning or as constituting threats to him. Id. at 8.

Dr. DeMier testified that there were concerns that Dr. Sell was developing a delusion of the erotomania type toward a female psychiatric nurse at Springfield. He was inappropriately familiar with the nurse, addressed her by her first name, and expressed the belief that he and the nurse had a "special relationship." Dr. Sell said to the nurse: "Why don't you think I'm special anymore . . . you never have time for me anymore . . . I'm not special anymore . . .you just don't realize what you mean to me . . . ." (Medication Hearing at 13, 45-46). As a result of Dr. Sell's conduct, the nurse felt threatened and Dr. Sell was moved to a more secure wing of the institution. Id. at 13. Dr. Sell then advised staff that he was moved for "messing with the nurse" and

that "I have never touched her, but I would have if she asked me to." Dr. DeMier testified that Dr. Sell expressed love for this nurse and told staff that "I can't help it." Id. at 13-14. He also indicated that he could smell the presence of the nurse. Id. at 14.

Dr. DeMier noted that Dr. Sell's prior delusions had been focused on larger entities or larger issues. However, his comments directed toward Dr. DeMier and the nurse were evidence that Dr. Sell's delusions had become directed and personal and thus more immediate. As a result Dr. DeMier felt that Dr. Sell was dangerous at this time and there was an increased risk for immediate violence due to changes in his thought processes. Id. at 17-19, 68. Dr. DeMier also had concerns that due to his delusions, Dr. Sell would perceive innocuous actions and benign comments as threatening and would strike out to protect himself from the perceived danger. Id. at 18-19.

Dr. Wolfson evaluated Dr. Sell's conduct toward the female psychiatric nurse and concluded that the conduct was an indication of Dr. Sell's problems with boundaries. He testified that Dr. Sell was dangerous in a broad sense and had been moved to a more restrictive area to deal with the danger. Id. at 82, 127.

The record before the Magistrate Court also included Dr. Sell's racially charged diatribe directed toward Special Agent Anthony Box (an intended victim in the murder plot) and the Assistant United States Attorney during a court proceeding. The Magistrate

Court was also aware that during the same proceeding Dr. Sell spat in the face of Magistrate Judge Mary Ann Medler, who was presiding over the proceeding. It is significant that this latter incident occurred when Dr. Sell was locked in a cell and several U.S. Marshals were present.

The Magistrate Court also had the unique opportunity to hear the testimony and observe Dr. Sell during several lengthy and often vocal court appearances. Dr. Sell's brief testimony at the medication hearing reflects his severe lack of judgment and perception. Dr. Sell stated to the Court that the nurse was flirtatious and he did not consider it inappropriate for a patient to have physical contact with female staff at Springfield. Id. at 177, 178.

Dr. Sell's psychiatric history, his history of violence and threatening behavior, and his declining condition and conduct at Springfield are clearly reflective of dangerousness. In a normal setting, Dr. Sell's conduct would be disturbing. In an institutional setting such as Springfield, Dr. Sell's behavior could result in harm to himself and staff. The record before this Court clearly establishes that the Magistrate Court did not clearly err in ordering the involuntary medication of Dr. Sell because he was dangerous. The District Court's order vacating the Magistrate Court's finding of dangerousness therefore should be reversed.

II. THE GOVERNMENT ESTABLISHED BY CLEAR AND CONVINCING

EVIDENCE THE PREREQUISITES FOR INVOLUNTARY MEDICATION

Dr. Sell argues that the government failed to establish by clear and convincing evidence the prerequisites for involuntary medication. As argued above at page 22-24, the government proved by clear and convincing evidence the prerequisites for involuntary medication. Therefore, this argument lacks merit.

III. THE DISTRICT COURT APPLIED THE APPROPRIATE STANDARD OF REVIEW TO THE MAGISTRATE COURT'S FINDING THAT APPELLANT SHOULD BE INVOLUNTARILY MEDICATED.

Dr. Sell argues that the District Court applied the wrong standard, a balancing standard, in reviewing the findings of facts of the Magistrate Court. He asserts that the District Court should have applied the strict scrutiny standard to the findings because the forcible medication related to competency restoration only. Dr. Sell requests a remand to the District Court so that the District Court may receive evidence concerning competency restoration and review the evidence under the strict scrutiny standard.

As argued in this brief at pages 20-21, the Government does not believe that a strict scrutiny analysis was required in the present case, but that in any event the District Court applied this standard in considering whether Dr. Sell could be forcibly medicated to restore his competency. This issue therefore lacks merit.

IV. THE DISTRICT COURT'S ORDER TO MEDICATE DR. SELL DOES NOT DEPRIVE HIM OF HIS RIGHT TO A FAIR TRIAL.

Dr. Sell contends that if his treatment is effective, his improved and more coherent demeanor during trial may be inconsistent with and impair his ability to present his diminished capacity defense and could interfere with his Sixth Amendment right to a fair trial. Brief of Appellant 48-49.

A defendant has "no absolute right to present himself as he was on the day of the alleged crime..." United States v. Weston, 134 F. Supp.2d at 137. As Judge Henderson stated in her concurring opinion in United States v. Weston, 206 F.3d 9, 15 (D.C. Cir. 2000):

> I see no difference between [Weston's] potentially altered state [at trial], as compared to his conduct on the day of the murders, and the status of a defendant whose defense to murder is of the "heat of passion" variety. No one would argue that due process requires that the latter duplicate his "hot blood" in court. In any event the testimony of both lay and expert witnesses, whether on direct or cross, will suffice to address any differences in Weston's appearance.

A defendant is entitled to a "fair trial, not a perfect one." Id., at 22 (Tatel, J., concurring).

Evidence of a defendant's mental defect, other than his demeanor at trial, can be effectively used to establish an insanity defense. Weston, 134 F.Supp. 2d at 136. In Weston, the Court stated that the defendant could introduce other forms of evidence

to support a mental defect defense if the defendant's appearance contradicts that claim. Id.(insanity defense). A combination of psychiatric and lay testimony, along with video tapes of the defendant during his delusional episodes, could effectively fulfill this objective. Id. Jurors could also be informed of the defendant's treatment and its effects on his demeanor. Id. at 137. The Court in Weston further suggests that this type of evidence would indeed entitle the defendant to an appropriate jury instruction on the defense. Id., at 136.

Finally, the issue of whether Dr. Sell's fair trial rights will be violated as a result of the treatment is prematurely before the Court. As the District Court in Weston determined, it is not essential prior to the administration of the medication to determine whether the involuntary medication will result in unfair prejudice to the defendant. Id at 136-137. The Weston Court further suggested that it could later evaluate any detrimental effects of the medication when "testimony about the actual, not hypothetical, impact of the medication is available." Id., at 137.

At present, it is impossible to ascertain exactly how the medication will affect Dr. Sell or his trial rights. The treatment may actually enhance those rights, allowing Dr. Sell to be more aware of the proceedings against him and permitting him to more effectively consult with his counsel and to assist in his defense. Thus, it would be inappropriate for the Court to determine how the hypothetical side effects of the medication would affect

Sell's trial rights. It would be preferable that the Court make this determination when the actual impact of the treatment is known and can be evaluated.

The Government submits that the approach taken by the District Court will fully protect Dr. Sell's rights to a fair trial and to assistance of counsel. The District Court made crystal clear its awareness of the post-medication issues and its intention to examine them very closely at the appropriate time. (District Court Order, April 4, 2001 at 14-16).

The District Court's order to medicate Sell did not deprive him of his Sixth Amendment fair trial rights.

CONCLUSION

Wherefore the order to administer anti-psychotic medication should be upheld.

Respectfully submitted,

RAYMOND W. GRUENDER
United States Attorney

_____
HOWARD J. MARCUS
Assistant United States Attorney

_____
DOROTHY L. MCMURTRY 6703
Assistant United States Attorney

111 South 10th Street, Room 20.333
St. Louis, Missouri 63l02
(3l4)-539-2200

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Rule 32(a)(C)(7) that this brief is in proportional type and contains 12727 words, and pursuant to Eighth Circuit Rule 28A(c) that this brief was prepared using WordPerfect 8.

_____
ASSISTANT UNITED STATES ATTORNEY

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ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and one diskette that has been scanned for viruses and is virus free, were mailed postage prepaid United States Mail first class to:

LEE T. LAWLESS
Assistant Federal Defender
1010 Market Street, Suite 200
St. Louis, Missouri 63101

BARRY A. SHORT
Lewis, Rice & Fingersh, L.C.
500 N. Broadway, Suite 2000
St. Louis, Missouri 63102

on this ____ day of July 2001.

_____
ASSISTANT UNITED STATES ATTORNEY